

[illegible]

Smith v. Allbaugh, et al.  
October 30, 2019

A P P E A R A N C E S

For the Plaintiff:

Paul DeMuro  
FREDERIC DORWART, LAWYERS, PLLC  
124 East Fourth Street  
Tulsa, Oklahoma 74013

Henry A. Meyer, III  
MULINIX GOERKE & MEYER, PLLC  
210 West Park Avenue  
Suite 3030  
Oklahoma City, Oklahoma 73102

Katherine R. Rosenfeld  
EMERY CELLI BRINCKERHOFF & ABADY, LLP  
600 Fifth Avenue  
Tenth Floor  
New York, New York 10020  
(via telephone)

For the Defendants:

Kari Y. Hawkins  
OKLAHOMA ATTORNEY GENERAL'S OFFICE  
313 Northeast 21st Street  
Oklahoma City, Oklahoma 73105

Smith v. Allbaugh, et al.  
October 30, 2019

1 (Proceedings held on October 30, 2019.)

2 THE COURT: Good morning. This is Judge Goodwin.  
3 We're here for the status and scheduling conference in  
4 Christina Smith versus Joe Allbaugh, et al., Case Number  
5 19-CV-470.

6 I'll have counsel make their appearances.

7 MR. DeMURO: Good morning, Your Honor.

8 May it please the Court: Paul DeMuro of Frederic Dorwart  
9 Lawyers in Tulsa and Hank Meyer of Oklahoma City here  
10 personally and Ms. Katie Rosenfeld from New York is on the  
11 phone.

12 We appreciate the Court's courtesy. Ms. Rosenfeld wanted  
13 to be here very much but suffered an injury while she was on  
14 her way to the airport in New York and was unable to make it.  
15 So we appreciate Your Honor's flexibility in allowing her to  
16 participate by phone.

17 THE COURT: Absolutely.

18 MS. HAWKINS: Kari Hawkins for the defendants, named  
19 defendants.

20 THE COURT: All right. Thank you, Ms. Hawkins.

21 Okay. We've got a couple of issues on the case. We've  
22 got a pending motion to dismiss. I'm expecting to have an  
23 order on that shortly.

24 We've got, at the same time, a motion to begin discovery  
25 in advance of that ruling.

Smith v. Allbaugh, et al.  
October 30, 2019

1       Why don't I start with the plaintiff, and I'll have you  
2 tell me a little bit about the case and what's going on, from  
3 your perspective, and then anything else that you want to tell  
4 me on the motion for immediate discovery.

5           MR. DeMURO: Yes, Your Honor.

6       May it please the Court: This case concerns the death of  
7 a 21-year-old young man in Joseph Harp Correctional Center in  
8 May of 2018.

9       He had been sentenced to less than a year in prison for a  
10 fourth-degree arson felony that he committed when he was 20  
11 years old. A few weeks before his death -- he died of acute  
12 appendicitis.

13       Now, our claim, Your Honor, is -- we've asserted several  
14 claims. The gravamen of the petition is a 42 U.S.C., 1983  
15 claim.

16       Our contention is that the defendants were deliberately  
17 indifferent to an obvious and objective serious medical  
18 condition.

19       Specifically, during the weeks preceding his death,  
20 Joshua England was exhibiting the classic symptoms of  
21 appendicitis. He sought medical care through the D.O.C.'s  
22 procedures, Joseph Harp's procedures, on five separate  
23 occasions within the last week or so of his death.

24       On each occasion he was complaining of the classic  
25 symptoms of appendicitis; elevated heart rate, weight loss,

1 dizziness, severe abdominal pain, confusion. The symptoms  
2 progressed during the week. He was witnessed, by various  
3 people, falling down, being incoherent.

4 The last time that he went of the series of five visits  
5 within that seven or eight days, at that time the staff had  
6 not provided any meaningful medical care, no abdominal exam.  
7 He didn't see a physician. He was given things like  
8 Pepto-Bismol and sent back to his cell.

9 The last time that he went down there, the day of his  
10 death, he was exhibiting symptoms of toxic shock; confused,  
11 couldn't walk, had to be wheel-chaired down there.

12 By some manner or mechanism, the medical staff at D.O.C.  
13 purported to have him sign a waiver of treatment form that  
14 said something to the effect of "you're suffering from a  
15 condition that may cause your death but you hereby waive  
16 treatment."

17 Of course, that was after he sought treatment five times  
18 in seven or eight days. They took him back -- wheeled him  
19 back to his cell where he died on the floor alone in a pool of  
20 green bile, again classic symptoms of appendicitis. The  
21 autopsy report confirmed that he died of simple appendicitis.

22 We -- in investigating the case, Your Honor,  
23 Ms. Rosenfeld and I went to the prison before we filed suit.  
24 We're very careful about the suit -- the type of cases that we  
25 file.

1 We interviewed five different inmates; my recollection,  
2 five. Several of the inmates talked about the conditions that  
3 I just described, witnessing Joshua's final moments and the  
4 various instances where he sought medical care.

5 Several of the inmates also said they witnessed a D.O.C.  
6 staff member, on Joshua's final day, following him back to his  
7 cell from the medical unit with a video camera, purporting to  
8 videotape his alleged refusal of medical care, and that  
9 that -- there was a videotape -- video camera following him  
10 back. Several witnesses have either told us they saw it or  
11 they heard about it.

12 This kind of segues into our discovery motion. So hold  
13 that thought for just a second.

14 Based on those claims, Your Honor, we've -- based on  
15 those allegations, we have sought 1983 claims. I'll back up a  
16 minute.

17 In our investigation of this case, we also did some  
18 background work on the medical professionals who provided  
19 care, Defendant Balogh and the medical -- Physician's  
20 Assistant Miles.

21 Both of them have very checkered pasts. Both suspended  
22 for their own drug-alcohol use, fraudulent conduct as medical  
23 professionals, put on probation or suspension, and then landed  
24 at Joseph Harp. Those were the people responsible for his  
25 care.

Smith v. Allbaugh, et al.  
October 30, 2019

1        So we have asserted a 1983 claim based on deliberate  
2        indifference to an obvious serious medical risk. We've  
3        asserted a group of state law claims, Your Honor, including  
4        medical malpractice against the medical folks, intentional  
5        infliction of emotional distress, and wrongful death. There  
6        are some other state law claims, but that's the essential  
7        categories.

8        Now, we move forward to the motion under this Court's  
9        local Rule 26.2(c), and the basis is fairly simple.

10       The only grounds that the defendants have to seek a stay  
11       of discovery separate from the local rule is their assertion  
12       of qualified immunity.

13       Our position is that this Court retains the discretion,  
14       in a qualified immunity context, to order discovery, limited  
15       discovery, based on several considerations, including the  
16       facial merits of the motion and the relative burdens to the  
17       parties.

18       The basis of the defendants' motion, Your Honor, in  
19       qualified immunity is that there was no -- it has to be  
20       because this is qualified immunity. There was no clearly  
21       established Constitutional right for a prisoner to be free of  
22       deliberate indifference of a serious medical condition.

23       That's an untenable argument on its face. There's a line  
24       of cases dating back to *Estell v. Gamble*, U.S. Supreme Court,  
25       1976. Several cases in the Tenth Circuit, *Mata v. Saiz* and

1 the *Robinson* case, a 2014 case, in our brief, which talk about  
2 these specific types of allegations.

3 The Tenth Circuit has said clearly years ago there can  
4 be, quote, little doubt that the right to be -- to medical  
5 care for a serious medical condition and deliberate  
6 indifference to a serious and obvious medical condition is a  
7 clearly established Constitutional right, including, in the  
8 *Robinson* case, severe abdominal pain.

9 So we've got a situation that is right on point, in terms  
10 of establishing a clear Constitutional right.

11 The defendants have asserted the qualified immunity  
12 defense at this early stage. We think that that's a highly  
13 untenable position, to put it politely, because it's such an  
14 obviously clearly established right.

15 So, therefore, we're seeking limited discovery. The  
16 discovery we're seeking, Your Honor, is stuff -- is material  
17 that's in their possession and would not cause any burden, any  
18 substantial burden.

19 I'll give you two examples.

20 We just want to know, where's this videotape? We're  
21 concerned about spoliation. We've talked to the D.O.C.  
22 counsel before we filed suit, put them on notice, hey, there's  
23 a videotape there, please preserve it. We get no verification  
24 back that a videotape exists.

25 When we file the lawsuit, we engage in discussions again.

Smith v. Allbaugh, et al.  
October 30, 2019

1 We'd like to know whether there's a videotape; if there is,  
2 please preserve it, please produce it.

3 We've been rebuked of any discussions around it. We're  
4 not getting a clear answer.

5 And in their response to our motion for discovery, they  
6 are coy in their phrasings about whether there's a videotape  
7 or not.

8 We just want to know, is there -- was a videotape made?  
9 If so, where is it? Who made it? And we want it. It's just  
10 that simple. So that's the type of discovery we want.

11 We also just want the investigative reports or witness  
12 statements that go along with this. We also want his medical  
13 files.

14 And some gamesmanship, we think, is being played here.  
15 When we asked for the videotape, they said, well, the  
16 videotape is not in his medical files. We really don't care  
17 where the videotape is, we just want it.

18 So that's why we're pressing early discovery, Your Honor.  
19 We think that the motion -- the assertion of qualified  
20 immunity is not tenable. You can evaluate that, I think, on  
21 its face, Your Honor.

22 And the burden of producing this material is not great,  
23 and it will advance early settlement discussions and early  
24 evaluation of the case.

25 If the folks that we interviewed are wrong and there was

1 no videotape, we need to know that.

2 We need to see his medical records, his complete medical  
3 records. There are statements in the joint status report of  
4 his medical records that we don't have.

5 All of that stuff will advance the case, advance early  
6 settlement discussions, and take care of issues regarding  
7 potential spoliation of evidence.

8 THE COURT: Okay.

9 MR. DeMURO: One further note, I think under the  
10 joint status report, Your Honor, the plan calls for an  
11 agreed -- preliminary disclosures under Rule 26 on November  
12 1st.

13 So ordering them to do this additional discovery, which  
14 is just, I think, four or five categories of documents,  
15 shouldn't impose any greater burden than they're already doing  
16 because I would suspect that most of the stuff we've requested  
17 should be produced on November 1st.

18 But given the history, in terms of not being able to get  
19 any clear answer on the videotape, we'd like Your Honor to  
20 permit us to submit some document requests.

21 THE COURT: Okay.

22 MR. DeMURO: Thank you, Your Honor.

23 THE COURT: I understand.

24 All right. I turn then to the defendant and hear, in  
25 general, about the case and your perspective on what this is

1 all about and then to address the motion for additional  
2 discovery -- or early discovery, I should say.

3 MS. HAWKINS: Thank you, Your Honor.

4 Our position is, with regard to the deliberate  
5 indifference claim, we feel like they've basically pled a  
6 negligence claim, but we don't believe that negligence rises  
7 to the level of deliberate indifference. It's a totally  
8 different standard.

9 We feel like that's why the defendants are entitled to  
10 qualified immunity. I think the record will show that at all  
11 times he was receiving medical care.

12 I mean, there's probably an issue with, was there a  
13 misdiagnosis? But I think that's different than being  
14 deliberately indifferent or ignoring his medical needs.

15 With respects to defendants Carl Bear and Joe Allbaugh,  
16 they have been sued for their failure to adequately supervise  
17 the medical staff.

18 They do not supervise medical staff. That's a totally  
19 different chain of command. Ultimately, of course, the  
20 director sits at the top of the state agency, but medical  
21 staff reports to the chief medical officer. They don't report  
22 to the warden of the prison or directly to the director of the  
23 Department of Corrections.

24 With regard to the tort claims, we feel like (audio  
25 garbled) -- you know, placing them outside the scope of

Smith v. Allbaugh, et al.  
October 30, 2019

1 employment. We don't agree that they were acting outside the  
2 scope of employment or in bad faith at any time.

3 Just the record supports the fact that they were seeing  
4 the plaintiff when he requested medical care at all times.

5 On the request for documents, I want to start out by  
6 saying this: We've never said that the plaintiffs can't  
7 subpoena those records from the Department of Corrections.  
8 That's the usual course of action in these cases when you sue  
9 individuals with a state agency.

10 They don't -- this is set forth in policy. Employees  
11 don't have access or the right to possess investigations or  
12 surveillance videos. They can't walk into a security office  
13 and say, I want a copy of a surveillance video.

14 By no means are we saying that the plaintiffs can't  
15 subpoena those records from the Department of Corrections.

16 And in the response to the Open Records request, Davidson  
17 Cincotta, the former general counsel, specifically said those  
18 are records that have to be subpoenaed.

19 I disagree wholeheartedly that the defendants possess  
20 custody and control over agency investigations and things like  
21 surveillance video. I don't even think they have custody or  
22 control over his medical records at this point. Those are  
23 closed files.

24 THE COURT: Are the defendants sued in their  
25 individual or official capacities or both?

Smith v. Allbaugh, et al.  
October 30, 2019

1 MS. HAWKINS: Individual capacities only.

2 THE COURT: Okay.

3 MS. HAWKINS: Individual capacities only.

4 Again, I have no objection to any subpoenas being issued  
5 to the State, Oklahoma Department of Corrections. They are  
6 the ones who have these records.

7 I want to get to the issue of the video. I thought it  
8 was important, in my joint status report, to go into a little  
9 bit more detail about the timeline of what happened because I  
10 do think there's some confusion about the video and when it  
11 was taken and by whom.

12 Joshua England signed the waiver of medical care at  
13 approximately 9:15. Everything is very well documented in the  
14 agency. I want to ensure the Court that nothing has been  
15 destroyed, there's been no spoliation of evidence.

16 As far as I know, the Department of Corrections still has  
17 all of those records that they would produce in response to a  
18 subpoena and hopefully under a protective order with the  
19 Court.

20 But the plaintiffs have specifically alleged that the  
21 defendants took a handheld video camera into Joshua England's  
22 cell and recorded him signing a waiver of treatment. That is  
23 not true.

24 The only defendant who walked into his cell with the  
25 waiver of treatment, along with some nonparties or parties who

Smith v. Allbaugh, et al.  
October 30, 2019

1 have not been named yet, were officers in the prison, and no  
2 one had a video camera. No one recorded him with a handheld  
3 video signing the waiver of treatment. That's false.

4 When he was found unresponsive, he wasn't in his cell, as  
5 has been alleged. He was on what we call the run or in the  
6 day room. He had sat down outside of his cell and then  
7 slumped over.

8 Prison officials responded. Pursuant to policy at that  
9 time, they're required to document that with handheld video.  
10 No defendants were there. No defendants recorded it. That  
11 video does exist.

12 If there's any, you know, doubt about what was or wasn't  
13 recorded by the defendants at any time, since it's a prison,  
14 there's also surveillance video that would show the response  
15 and who had a handheld video camera and at what time they have  
16 it.

17 All those records have been preserved by the Department  
18 of Corrections. Again, they can be subpoenaed at any time.

19 The defendants don't have custody or control over those  
20 records, and we have no problem with them subpoenaing those  
21 records.

22 I do have a problem with the allegation that the  
23 defendants walked in his cell and recorded him dying as he  
24 signed a waiver of treatment. That's just not true. It's  
25 been repeatedly alleged.

1       That's -- you know, we also feel like, pursuant to the  
2 Court rule and qualified immunity, defendants are not  
3 required -- the individual defendants are not required to  
4 participate in discovery at this point until the Court rules  
5 on the motion, but plaintiffs are free to subpoena whatever  
6 they want to from the Department of Corrections. I think  
7 David Cincotta made that clear in his response to the Open  
8 Records request.

9       Up until now, they have repeatedly said defendants have  
10 denied records. No records have been requested from the  
11 defendants. They filed an Open Records request to the agency,  
12 not to the defendants. So the defendants have not denied  
13 anything.

14       We've only objected to commencement of discovery until  
15 the Court rules on the motion to dismiss.

16       THE COURT: All right. I understand.

17       MR. DeMURO: May I briefly respond, Your Honor?

18       THE COURT: Yes.

19       MR. DeMURO: So this issue of individual capacity  
20 shielding them from discovery obligations is a false red  
21 herring issue.

22       In 1983 cases, because of the Eleventh Amendment, the  
23 plaintiff has to sue the offending defendants in their  
24 individual capacity, state actors in their individual  
25 capacity.

1       What the Attorney General is essentially arguing is that  
2 in no 1983 case does the warden of the prison have access to  
3 records. We've sued the warden.

4       That's a fallacious opinion. They have cited no  
5 authority for it.

6       The distinction of being sued in your individual capacity  
7 doesn't translate over to the Federal Rules of Civil Procedure  
8 and say it negates your custody and control of documents.

9       If that were the case, a 1983 plaintiff, such as  
10 Mr. England, would never be able to receive documents directly  
11 from the defendants.

12       That's not the case. There is no law to support that.  
13 We think this is a dodge. And this is the first time -- and  
14 I'll sit down with this.

15       We've been on this road for months, pre-investigation,  
16 engaging with the D.O.C., Open Records requests, filing a  
17 lawsuit, motions to dismiss, amendment, and this is the first  
18 time that we've heard a description of the video.

19       I'm glad we've heard it, but it shouldn't take that long  
20 to get to just what the core facts are and what the core  
21 evidence is. That's why we've asked for early discovery.

22       THE COURT: I understand. Okay.

23       Here's what we're going to do. I'm going to defer ruling  
24 on the motion for early discovery really only because I expect  
25 to have a ruling on the motion to dismiss within several days.

Smith v. Allbaugh, et al.  
October 30, 2019

1 And so if, for some reason, it takes me longer than I  
2 expected and we get locked up on an issue, then I'll get you a  
3 ruling on the motion for early discovery so that we'll have an  
4 answer on that, one way or the other, within a couple of days,  
5 but I do expect that in very short order we'll have a ruling  
6 on that motion. Then, one way or the other, that will resolve  
7 the question of how you proceed.

8 Let's talk, in general, about -- assuming that that all  
9 happens as I expect, you've requested nine months for  
10 discovery. That seems reasonable to me. That would result in  
11 an October 2020 trial docket under the Court's standard  
12 schedule.

13 Is there any heartburn about that trial setting?

14 MR. DeMURO: No, Your Honor. I think that's  
15 appropriate.

16 THE COURT: All right. From the defendant?

17 MS. HAWKINS: No, Your Honor.

18 THE COURT: Okay. Any need for any specialized  
19 discovery deadlines?

20 MR. DeMURO: Your Honor, I don't think so.

21 I do think there is a need in Your Honor's scheduling  
22 order to put another milestone for amendment to the pleadings.

23 In these types of cases, it's not infrequent, when we  
24 find out who did what, to amend to add additional folks.

25 Given that your scheduling conference summary sheet of

1 scheduling orders for nine months out puts the final --  
2 plaintiff's final witness lists, you know, in the June or May  
3 frame, I suggest there be an amendment deadline sometime in  
4 the first quarter of 2020. Sometime in February, I think,  
5 would be appropriate.

6 That would give us a chance to get some discovery back  
7 and see if we need to add additional parties.

8 THE COURT: All right. I'll take a look at that.

9 We have a typical deadline that we put in for amendment  
10 of pleadings. I think it's earlier than that. So 14 days is  
11 what we typically do.

12 MR. DeMURO: And I appreciate that. I don't think  
13 that's sufficient in this case because, as we've heard, you  
14 know, the D.O.C. is kind of like a black box. Until plaintiff  
15 can pierce it and get the discovery and know who reports to  
16 whom, we don't know all the defendants.

17 Some of them are John Doe defendants and Jane Doe  
18 defendants. So we'll at least need enough time to conduct an  
19 initial round of discovery and then sort it out.

20 So 60 days is perhaps more reasonable, 60 days from today  
21 or 90 days from today. Since we've got a trial that's  
22 relatively far out, I think that's not going to prejudice  
23 anyone.

24 THE COURT: Of course, the deadline is just a  
25 deadline to amend as a matter of right. You can always file a

1 motion for an amendment if there's a specific need.

2 Let me ask the defendant, is there any objection to a  
3 60-day amendment deadline?

4 MS. HAWKINS: No, Your Honor.

5 THE COURT: All right. Then I'll order that.

6 As far as ADR, I think you-all heard me previously say  
7 that my policy is that by the time we get to docket call in  
8 the case I want you to go through some formal process.

9 I don't care whether it's a judicial settlement  
10 conference with one of our magistrate judges or a private  
11 mediation. There's good folks either way. There's good  
12 reasons to go one way or the other.

13 So I'll leave that up to you, but I do want you, if  
14 you're not able to work it out on your own, to go through some  
15 formal process by the time we get to the trial setting.

16 That said, though, I always ask whether there is a need  
17 for me to nudge you along towards early settlement  
18 discussions.

19 Would this be a case where that would be appropriate?

20 MR. DeMURO: Your Honor, in our joint status report,  
21 we indicated the chances for settlement were poor.

22 From the plaintiff's perspective, I tell all my clients  
23 that a good settlement beats a good trial any day of the week,  
24 and we should always be -- have our minds set to that.

25 We would welcome any assistance by the Court. We think

Smith v. Allbaugh, et al.  
October 30, 2019

1 we have a strong case. As long as we have the documents  
2 necessary to evaluate our positions, I don't know that we need  
3 any particular assistance. We might later.

4 THE COURT: Okay.

5 MR. DeMURO: But I'm always --

6 THE COURT: Do you think you need some time to mull  
7 around and get your documents and then you'll see where you  
8 are?

9 MR. DeMURO: Correct, Your Honor.

10 THE COURT: All right. What I'll say in general is  
11 that I think people are more sophisticated than they used to  
12 be.

13 No one views it as a weakness to ask for the other side  
14 to set up a settlement conference or engage in settlement  
15 discussions. But every now and then, there is some  
16 reluctance, and I can play a role at least in nudging you  
17 along.

18 So if there is something that you collectively or  
19 individually decide that it would be useful for me to do, as  
20 far as helping you get to a good discussion of whether you  
21 want to settle, then just let us know by filing a motion or,  
22 if you need to, just call Mr. Buckle, my courtroom deputy, and  
23 we'll take it up at that time.

24 With that, is there anything that would be beneficial to  
25 talk about while we're all together?

Smith v. Allbaugh, et al.  
October 30, 2019

1 MR. DeMURO: Not from the plaintiff, Your Honor.  
2 Thank you for your time.

3 MS. HAWKINS: No, Your Honor. Thank you.

4 THE COURT: All right. Thanks to all of you.

5 As I say, we'll get orders out on those pending motions  
6 soon. Everyone here for that case is excused.

7 MR. DeMURO: Thank you, Your Honor.

8 MR. MEYER: Thank you, Your Honor.

9 MS. HAWKINS: Thank you, Your Honor.

10 MR. DeMURO: May we be excused?

11 THE COURT: Yes.

12 MS. ROSENFELD: Thank you, Your Honor.

13 THE COURT: Thank you.

14 (End of audio recording.)  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**REPORTER'S CERTIFICATE**

I, SHERRI GRUBBS, Federal Official Court Reporter in and for the United States District Court for the Western District of Oklahoma, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of audio-recorded proceedings transcribed to the best of my ability from an audio recording held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 24th day of January, 2020.

/S/ SHERRI GRUBBS

SHERRI GRUBBS, RPR, RMR, RDR, CRR  
State of Oklahoma CSR Number 1232  
Federal Official Court Reporter